United States Court of Appeals

for the Second Circuit

BRIEF FOR APPELLANT

74-2439

To be argued by
E. THOMAS BOYLE

UNITED STATES COURT OF APPEALS
FOR THE SECOND CIRCUIT

UNITED STATES OF AMERICA, Appellee, -against- ARTURO SANCHEZ, Appellant.	Docket No. 74-2439

BRIEF FOR APPELLANT

ON APPEAL FROM A JUDGMENT
OF THE UNITED STATES DISTRICT COURT
FOR THE SOUTHERN DISTRICT OF NEW YORK

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ON APPEAL FROM A JUDGMENT
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QUESTION PRESENTED

Whether it was error for the District Court to refuse to dismiss the indictment based on the Government's failure to comply with the Southern District Plan for Prompt Disposition of Criminal Cases ("The Plan").

STATEMENT PURSUANT TO RULE 28(3)

Preliminary Statement

This is an appeal from a judgment of conviction entered in the United States District Court for the Southern District of New York (The Honorable Kevin Thomas Duffy) convicting appellant Arturo Sanchez, after a jury trial, of one count of selling a narcotic drug, in violation of 21 U.S.C. §§812, 841(a)(1), and 841(b)(1)(A). Appellant was sentenced to one year in prison and to three years' special parole. He has been continued released on a $10,000 surety bond pending appeal.

Representation by The Legal Aid Society, Federal Defender Services Unit, was continued for purposes of this appeal, pursuant to the Criminal Justice Act.

Statement of Facts

This appeal follows a second trial on a charge of sale of cocaine, the second count in the indictment.* At the prior trial, conducted March 26-28, 1974, the jury acquitted appellant and his father of count one, conspiracy to distribute cocaine. On count two, which charged appellant and Jose Salest Valverde,

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*The indictment is annexed as "B" to appellant's separate appendix.

also known as "Salcita,"* with a sale of cocaine to Charles George Martinez, an undercover agent, the jury deliberated without reaching a verdict. According to the Government's proof, the sale took place on February 26, 1972, in the ladies' room of the Macchu Picchu Restaurant in Manhattan, and involved approximately an eighth of a kilogram of cocaine.

A. The Pre-Trial Delay

A warrant for the arrest of appellant was issued on January 4, 1973, based on a complaint alleging distribution of cocaine on February 26, 1972.** Appellant was arrested January 4, 1973, and was arraigned before a United States Magistrate the following day, January 5, 1973. The indictment was filed in the district court on January 15, 1973, and on January 22, 1973, appellant entered a plea of not guilty. The Government filed its notice of readiness on May 15, 1973, stating it would be ready to proceed to trial "on or after" May 31, 1973. The case was scheduled for trial on August 1, 1973, approximately seven months from the date of arrest.

However, on July 30, 1973, the Government requested a four-week continuance on the ground that its "principal" witness,

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*Hereinafter referred to as "Salcita." Because he was a fugitive, both of Salcita's trials were severed from appellant's.

**The record does not reveal why the Government chose to wait approximately ten months from the date of arrest before initiating prosecution. While count one, on which appellant was acquitted at the first trial, alleges a continuing conspiracy beginning January 1, 1972, the record of the first trial indicates that the Government's investigation ended in March 1972.

Martinez, had suffered an "accident" on July 20, 1973, which rendered him unavailable for "at least a month."* The District Court granted this motion, and the case was re-scheduled for trial on October 15, 1973, approximately nine months from the date of arrest. On October 10, however, the Government sought a second adjournment, again for one month, based on the continued unavailability of the same witness.** This motion was opposed by defense counsel, who contended that a further continuance would violate the Plan for Achieving Prompt Disposition of Criminal Cases,*** Rule 4. The Government's request for a continuance was granted on October 15, 1974.**** Thereafter, a period of more than four months elapsed without notification to the District Court or defense counsel that the Government was ready to proceed.

Finally, on February 22, 1974, defense counsel***** again

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*Affidavit of Assistant United States Attorney Pamela Davis, dated July 30, 1973, annexed as "D" to appellant's separate appendix.

**In her supporting affidavit Assistant United States Attorney Pamela Davis indicated that the witness had been examined by a physician on October 5, 1973. The physician reported that the witness would be unavailable for work or to appear in court "for several weeks." This affidavit, dated October 10, 1973, is annexed as "E" to appellant's separate appendix.

***Hereinafter referred to as "the Plan."

****The District Court set no new trial date at this time.

*****Counsel for the co-defendant filed this motion. Appellant joined in the application by notice of motion dated February 27, 1973.

moved to dismiss the indictment on the ground that the Government's delay, more than thirteen months from the date of arrest, was in violation of the Plan.*

The Government opposed this motion,** asserting that a month before, on January 22, 1974, in response to a private inquiry by Judge Duffy's law clerk, the Government had told the clerk it was ready to proceed to trial the following day, January 23, 1974, before Judge Bauman. In that same affidavit, while carefully not stating that the Government was then ready to proceed to trial, the Government alleged that the incapacity of its chief witness "is now the only intermittent."***

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*Counsel stated in his affidavit that Pamela Davis, the Assistant United States Attorney in charge of the case, had advised him on February 21, 1974, that the Government's principal witness was still unavailable to testify because of the injuries he had sustained in July 1973. Counsel urged that the indictment be dismissed under Rule 4 of the Plan on two separate grounds: one, for the thirteen-month delay which had already occurred; and two, because the Government's chief witness remained unavailable to testify and the Government could give no assurance he would be available within a reasonable period, as required by Rule 5(c)(i) of the Plan.

Counsel further stated that he was counsel to the plaintiff in Perma Research and Development Co. v. The Singer Co., 66 Civ. 665, a non-jury civil action in which trial was commenced before Judge Duffy on November 5, 1973. Counsel further asserted that the trial in Perma continued through December 14, 1973, when it was adjourned to January 8, and then sine die pending completion of United States v. Carmine Tramunti, et al., 73 Cr. 1099. Counsel argued that since Perma was a non-jury case, it could easily have been adjourned for the few days necessary to try this case. The affidavit appears at "F" of appellant's separate appendix.

**See the affidavit of Assistant United States Attorney Pamela Davis dated February 28, 1974, annexed as "G" to appellant's separate appendix.

***In addition, the Government argued that valid grounds for the adjournments existed under Rule 5(c)(ii) and 5(h), which do not require that the evidence then unavailable will become available within a reasonable time, as required by Rule 5(c)(i).

A hearing was conducted on the defendants' motion to dismiss on March 22, 1974. The sole witness was Charles Martinez, a New York City police officer assigned to the New York Joint Task Force, whose previous unavailability had caused the extended delays in the trial. Martinez testified that he injured his back and hit his head when he accidentally slipped and fell in the washroom at the Varick Street Precinct house while on duty on July 20, 1973. (Transcript of the Hearing held on March 22, 1974, at 4-5*). He was subsequently taken by ambulance to St. Vincent's Hospital where he was treated and released an hour later (Hearing, 4-6). Martinez stated he thereafter remained out of work until August 7, 1973 (Hearing, 8-9). During this period his back hurt and he suffered from nausea and dizzy spells.** Although he remained out of work between July 21 and August 6, he was not confined to his home during this period. Several times each week he drove from his home in Monroe, New York, located in Orange County, approximately sixty miles to New York City and Long Island to visit various doctors (Hearing, 5, 9, 10, 13, 14). In addition, he sought and was given permission by a Police Department physician to leave his house for "exercise" for three hours daily. Martinez testified that he

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*Hereinafter this transcript is referred to as "Hearing."

**He stated that the dizziness was always preceded by a feeling of nausea, and thus he always knew when a dizzy spell was coming on. These spells occurred two or three times a day and lasted a few minutes (Hearing, 34, 39).

used this time to go for walks and to take his wife grocery shopping* (Hearing, 11-12). Also in August Martinez and his family moved from their home in Bayside, Queens, to Monroe, New York** (Hearing, 35, 39-40). Martinez was totally unaware that this case was scheduled to go to trial on August 1, and was never contacted by the Government at any time concerning his availability as a witness (Hearing, 15).

Although the spells of dizziness and nausea continued, Martinez returned to work on August 7, 1973, and continued to work regularly through September 12. He was assigned to "light duty"*** during this period, and drove himself to and from work daily, approximately fifty-eight miles each way from his new home in Monroe, New York (Hearing 12-13). During this period he continued to visit doctors in the New York area, always driving himself to the appointments.

Martinez continued to work regularly until September 13, when he "wrenched" his back and "rapped" his head (Hearing, 15-16), this time while checking the transmission oil in his car

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*Martinez stated that his wife could not drive a car (Hearing, 33).

**Martinez testified that, without the services of a moving company but with the help of his brothers, Martinez and his wife and three children moved from their home in Bayside, Queens, to Monroe, New York. Martinez stated that the move occurred "some time in August" (Hearing, 35), without specifying an exact date. It appears that this move occurred during his first period of "sick" leave, prior to August 6, because the witness acknowledged driving from Monroe, New York, on August 6, to visit Dr. Choy on Long Island (Hearing, 6-10).

***Martinez described "light duty" as office work.

on his day off. Thereafter he remained out of work from September 13 to December 2, 1973. He returned to work on December 3, 1973. From September 13 to December 2, the dizziness and nausea persisted; however, Martinez continued to drive to doctors' offices in New York City and Middletown, New York, without assistance several times each week, and continued to leave the house with the consent of his doctors for "exercise" (Hearing, 17-23).

As on the Government's previous requests for adjournment, Martinez was never contacted and was unaware that the case was scheduled for trial on October 15 (Hearing, 24-25).

While not positive, Martinez asserted that it was quite "possible" he testified before the grand jury in December in the Federal courthouse following his return to work on December 3, 1973 (Hearing, 25). He distinctly recalled testifying in the Eastern District case of United States v. Cuevas, 73 Cr. 4[illegible] (Hearing, 30), which was tried in January 1974, although during this time doctors were continuing to treat his attacks of nausea and dizziness.* As before, he was always forewarned of the

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*Martinez stated that on January 8, 1974, he was treated by a Dr. Merritt, a neurologist at Columbia-Presbyterian Hospital, who gave him medication and diagnosed his condition as a "mild disturbance of the inner ear." Dr. Merritt instructed Martinez simply to "get along" with the symptoms until they disappeared. Medical records from various doctors who treated Martinez were turned over to the defense by the Government and received into evidence as Defendant's Exhibit A. At the Government's request the District Court also received into evidence a letter dated October 4, 1973, signed by a New York City Police Department physician and addressed "To whom it may concern" which stated that Martinez was on the sick list and unable to make court appearances for several weeks (Government Exhibit 1) (Hearing, 33).

vertigo by a feeling of nausea. Thus, even though driving a car, he had sufficient advance warning to pull off the road and wait a few minutes for the dizziness to subside (Hearing, 33, 34, 39).

Following Marintez' testimony, Assistant United States Attorney Davis made an "offer of proof" that prior to the adjournment requests of July 30 and October 10, she "phoned police headquarters and inquired as to the availability of Patrolman Martinez ... [and] was informed that the police surgeon had reported him on sick duty and he was not available for testimony" (Hearing, 40-41).

Defense counsel argued that Martinez was actually available to testify during the entire period of his alleged illness since during this entire period he was capable of driving long distances by car to visit doctors in New York City and its surrounding counties. Alternatively, counsel argued that Martinez, at the very least, was available to testify during those periods of time when he was regularly reporting to work, i.e., August 7 to September 13, and December 3 to the present (Hearing, 41-42).

The Government's position at the hearing was that Martinez was unavailable to testify during the periods he was on sick leave (Hearing, 43). Concerning the Government's failure to inform the court of Martinez' availability to testify between August 7 and September 13, Assistant United States Attorney Davis asserted, with no explanation, that this was not "through any fault of the Government" (Hearing, 43). Concerning the

Government's failure to apprise the District Court of the witness' availability from December 3 through February, Assistant United States Attorney Davis stated* that the Plan imposed no such obligation because the defendants had made no demand that the witness be produced or a new trial date set. Defense counsel argued that under the Plan the Government had a continuing responsibility to inform the court and defense counsel of its witnesses' availability so that the case could be scheduled without further delay, and further pointed out that the Plan specifically stated that no such demand was necessary (Hearing, 44).

Judge Duffy reserved decision after the hearing, and the trial commenced on March 26. Both defendants were acquitted on count one (conspiracy), and the jurors could not reach a verdict as to appellant's guilt on count two (distribution of cocaine).

On April 2, 1974, the District Court entered an order denying the defendants' motion to dismiss the indictment for failure to comply with the Plan.**

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*Assistant United States Attorney Davis stated (Hearing, 43-44):

> Following this adjournment of four weeks, the Government's position was that either the witness would be produced if a trial date was set or else if he could not be produced another motion would have to be made. Neither trial date was set and hence no motion was made. There has certainly been throughout the period of time December through January, no demand whatsoever by the defendants that the witness be produced or that a trial date be set.

**This motion was renewed and again denied on September 9, 1974, the date the retrial began.

In his opinion,* Judge Duffy summarized the evidence adduced at the hearing on March 22, at which Patrolman Martinez was the sole witness, as follows:

> The only person who testified at the hearing was Patrolman Martinez himself. He stated that following his accident on July 20, 1973, he was placed on sick leave until August 7, 1973, when he returned to work. He said that he was assigned to light duty until September 13, when he had another accident, causing him to be absent from work until December 3, 1973. During this period and continuing to the present time, his main symptoms were intermittent nausea and vertigo, but he was nonetheless able to drive a car. He said that the nausea would precede the vertigo and that if he happened to be driving, he would pull over to the side when he felt the nausea and wait 10 or 15 minutes until the vertigo passed. He was not aware that the trial of this case had been adjourned on his account, and he had not been called at home by the Assistant United States Attorney in either August or October to discuss his availability for trial. However, the Assistant United States Attorney represented at the hearing that both times before requesting a postponement she had called Patrolman Martinez' office, had been told he was on sick leave, and had discussed his symptoms with the Police Surgeon. In addition to his testimony, Patrolman Martinez' medical records were introduced, showing that the July 20 accident had caused temporary blackness of vision in his left eye in addition to the dizziness and that the accident of September 13 had caused a cerebral concussion. An eye examination of November 9, 1973, indicated that there was no longer a problem with his vision.
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> Opinion, at 3-4.

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*The opinion is "H" to appellant's separate appendix.

In finding no violation of the Plan, the District Court stated:

> These facts do not justify dismissing the indictment. Both times the government requested an adjournment Patrolman Martinez was too ill to be at work and hence too ill to testify. The fact that he could drive a car does not alter this conclusion, nor does the fact that the Assistant United States Attorney did not telephone him at home. Both the government and the defendant are entitled to the testimony of a witness who is not likely to be seized by blackness of vision or dizzy spells on the witness stand.
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> In these circumstances, dismissal of the indictment is not required by the Plan for Achieving Prompt Disposition of Criminal Cases. The Plan necessarily allows the government a certain amount of flexibility in making its witnesses available for trial. United States v. Rollins, 475 F.2d 1108 (2d Cir. 1973); United States v. Cacciatore, 487 F.2d 240 (2d Cir. 1973); United States v. Cuomo, 479 F.2d 688 (2d Cir. 1973). Here, the government's Notice of Readiness was filed within four months of the indictment, and the original scheduling of the trial on a date two and a half months later was necessary to accommodate the crowded calendar of a newly appointed judge with a large caseload. Similarly, the period between December 3, 1973, and March 21, 1974, was taken up by two previously scheduled trials. Under the circumstances, the four month period of adjournment from August to December 1973, caused by Patrolman Martinez' illness, was a "reasonable period" within the meaning of Rule 5 (c)(i).
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> The defendants argue that the government should have notified the Court when Patrolman Martinez became available on December 3. While this undoubtedly would be preferable as a general practice, it would not have resulted in an earlier trial for these defendants and therefore the government's failure to do so does not require dismissal of the indictment.
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> Opinion, 4-5.

B. The Re-Trial*

The Government's case was made out through the testimony of two New York City police officers on assignment to the New York Drug Enforcement Joint Task Force. Officer Charles Martinez testified that he was the undercover agent who made the direct buy from appellant on the day in question. Officer Raymond Valley participated in the investigation in a surveillance capacity. Appellant testified in his own defense and denied making a sale to Officer Martinez.

1. The Government's Case

Martinez testified that he was introduced to appellant and appellant's father by a confidential informant on February 24, 1972, at the Macchu Picchu Restaurant at 1595 Third Avenue, New York City, where appellant and his father were then employed (12-13**). The following day, at approximately 8:00 p.m., Martinez returned to the restaurant alone looking for appellant's father. Appellant advised Martinez that his father would be in shortly and directed Martinez to a table (15). By 9:00 p.m., appellant's father not having returned, Martinez told appellant that he was supposed to purchase an eighth of a kilogram of

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*The second trial commenced before Judge Duffy on September 9, 1974.

**Numerals in parentheses refer to pages of the transcript of the second trial.

cocaine from appellant's father, and appellant offered to supply Martinez with an eighth of a kilogram of cocaine for $1,800. Martinez stated that he would consider the offer, and left the restaurant. Martinez returned later that evening at around 11:45 and accepted the offer (15).*

Martinez appeared at the restaurant at 3:00 p.m. on February 26, and appellant was not there. After some waiting, Martinez spoke to "Salcita," who agreed to go find appellant. "Salcita" returned to the restaurant with appellant around 4:30 p.m. Thereafter, "Salcita" instructed Martinez to meet appellant in the ladies' room. There, appellant handed Martinez a brown paper bag containing a white powder.** Outside the ladies' room Martinez stuffed $1,800 into Sanchez' pocket and then left the restaurant (18-22; 39-40).

Testimony by Officer Raymond LaValley, a member of the surveillance team, basically supported that Martinez had given concerning the dates and times Martinez and appellant were observed entering and leaving the restaurant (50-57).

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*According to Martinez, appellant instructed him to return to the restaurant at three o'clock that morning, i.e., February 26. Martinez returned at that time and was told to come back at 3:00 p.m. The sale took place at approximately 5:00 p.m. that afternoon.

**On February 28, 1972, the brown paper bag and its contents were transported to the chemist for the Bureau of Narcotics and Dangerous Drugs where it was tested and found to contain 97.45 grams of cocaine and dilutants. Both parties stipulated to the chemist's testimony (Government Exhibit 2, 65-67). The brown paper bag and its contents were admitted into evidence (Government Exhibits 1-B, 1-C, 1-D, 22-24).

2. The Defense

Appellant testified that he recalled being introduced to Martinez some time in 1972 and that thereafter Martinez came to the restaurant on several successive days looking for appellant's father, who also worked there at the time. Appellant testified that Martinez asserted he was there to buy cocaine from appellant's father. However, appellant's father was never at the restaurant at the time of Martinez' visits (73, 78-79, 83-92). However, on each visit to the restaurant Martinez insisted that appellant sell him cocaine. Each time appellant refused. Finally, simply to "get rid of" Martinez, appellant told Martinez he would get him some cocaine (75, 98). Never actually intending to follow through on this offer, he told Martinez to return to the restaurant at a time appellant knew he would not be at work (75). On the day of the proposed sale Martinez showed up and appellant, as planned, was not there. However, appellant was summoned from his house by someone from the restaurant, and later that afternoon appellant returned to the restaurant and had several drinks with Martinez. At no time did he sell Martinez any drugs (98).

On the re-trial, appellant was found guilty of the substantive offense charged in count two of the indictment.

ARGUMENT

IT WAS ERROR FOR THE DISTRICT COURT NOT TO DISMISS THE INDICTMENT BASED ON THE GOVERNMENT'S FAILURE TO COMPLY WITH THE SOUTHERN DISTRICT PLAN FOR PROMPT DISPOSITION OF CRIMINAL CASES ("THE PLAN").

A period of approximately fourteen months elapsed from the date of appellant's arrest on January 4, 1973, to appellant's motion to dismiss for failure to comply with the Plan on February 27, 1974. The Government filed notice it would be ready "on or after" May 31, 1973, approximately four months after appellant's arrest. On August 1 and October 15, after expiration of the six-month period, the Government requested adjournments because of the alleged "unavailability" of its chief witness, Charles Martinez. Contrary to the Government's contention and the District Court's findings, this witness was, in fact, available to appear and testify during the entire seven months the Government indicated it was unable to proceed. Since the witness was not "unavailable" to testify under Rule 5(c)(i), and since the Government here failed to exercise "due diligence to obtain such evidence" (Rule 5(c)(i)), this period should not have been excluded in determining whether the Government had violated the Plan.

Below, the Government took the position that the Plan imposed no obligation to advise the court of changes in its state of readiness on December 3 because the District Court had set

no new trial date. The District Court erred in not rejecting this contention and dismissing the indictment.

A. The District Court erred in finding that Martinez was "unavailable" to testify during the period from August 1 to December 2 and that this was an "excluded" period under Rule 5(c)(i)* of the Plan.

1. Martinez was not "unavailable" to testify during this period within the meaning of Rule 5(c)(1).

In interpreting the meaning of the term "unavailable," as used in Rule 5(c)(i), this Court has consistently looked to the "common sense meaning" of the term (United States v. Flores, 501 F.2d 1356, 1358 (2d Cir. 1974); United States v. Rollins, 487 F.2d 409, 412 (2d Cir. 1973)), in express reliance on the

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* Rule 5. Excluded Periods.

In computing the time within which the Government shall be ready for trial under Rules 3 and 4, the following periods of time should be excluded:

...

(c) The period of time during which:

(i) evidence material to the Government's case is unavailable, when the prosecuting attorney has exercised due diligence to obtain such evidence and there are reasonable grounds to believe such evidence will become available within a reasonable period.

views expressed in Wigmore, EVIDENCE, §§1401-1418 (3d ed. 1940). Wigmore, at §1406(b), sets forth the applicable standard as follows:

> As to the degree of the illness, the traditional phrase "so ill as not to be able to travel" sufficiently indicates the requirements of common sense; and the "ability" is to be considered with reference to the risk of pain or damage to the witness.

Here, in the period between August 1 and December 2,* there is no question that Martinez was "able to travel." During this entire period, several times each week he would drive himself to doctors' offices in New York City and its environs from his home in Orange County. During the first "sick leave" period -- July 20 to August 6 -- Martinez was well enough to move his family from Bayside, Queens, to their new home in Monroe, New York.** During the period August 7 through September 12, he regularly reported to work, driving to and from Monroe each day, a distance of some sixty miles each way. During the period September 13 to December 2 he drove from Monroe on numerous occasions to New York City and Middletown, New York, to visit doctors.

The hearing record further reflects that although Martinez was on sick leave from July 20 to August 6 and from September 12 through December 2, he was never confined to bed or even to his home. Instead, he was permitted to leave his home daily for three hours of "exercise." Martinez testified that during

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*The case was set for trial on August 1; therefore, the time between July 20 and August 1 is not counted.

**Martinez testified that his family moved some time in August. However, Martinez' acknowledgment of driving from Monroe, New York, on August 6 to visit Dr. Choy in Queens (Hearing, 6) establishes that the move occurred prior to that date. Dr. Choy's report of this examination is "J" to appellant's separate appendix.

this time he would go walking or drive his wife to the market and help with the shopping.

While Martinez testified that he had dizzy spells two or three times a day during the entire period between August 1 and December 2, he was always forewarned by a feeling of nausea and therefore, even if driving a car, had sufficient time to pull off the road prior to an attack. After a few minutes, the dizziness would subside and he could resume driving. The District Court's finding that one "too ill to work [is] to ill to testify"* is not the proper standard. See Wigmore, EVIDENCE, supra. Moreover, while it might be a relevant factor to consider where one is engaged in a sedentary occupation, it is certainly not relevant here. As an undercover narcotics agent dealing in the drug underworld, Martinez' life was in constant danger every day. Survival at any given moment could well depend on his ability to defend himself from physical attack. It simply does not follow that because he was unable to engage in such a hazardous occupation he was also unable to appear in court and testify.

The District Court was also in error in concluding that

> [b]oth the government and the defendants are entitled to the testimony of [a] witness who is not likely to be seized by blackness of vision or dizzy spells on the witness stand.
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> Opinion, at 4.

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*District Court opinion dated April 2, 1974, annexed as "H" to appellant's separate appendix.

As the opinion below notes, the "blackness of vision" was only "temporary" and thus, by November 9, 1972, "there was no longer a problem with [Martinez'] vision." Ibid. Moreover, this condition never prevented the witness from working between August 7 and September 12, nor did it prevent him from driving a car long distances to and from work and doctors' appointments.

Since the witness was always forewarned of an attack by a feeling of nausea, the court would have had ample opportunity to excuse the jury should the witness have felt that one of these spells was imminent during testimony. The record is devoid of proof that appearing in court to testify would in any way have placed the witness' health in jeopardy or have caused him to experience any greater discomfort. Moreover, out of an excess of caution, the District Court could have taken appropriate steps to see that a doctor or nurse was in attendance if needed. Bernstein v. Travia, 495 F.2d 1180, 1182 (2d Cir. 1974); see also United States v. Schaffer, 433 F.2d 928 (5th Cir. 1970); United States v. Knohl, 379 F.2d 426 (2d Cir. 1967).

2. The Government failed to exercise "due diligence to obtain" Martinez' appearance, as required by Rule 5(c)(i).

In requesting a continuance "for at least a month" on July 30, the Government alleged that Martinez was examined by a physician on July 26, 1973, who reported that it would be "at least a month before the witness would be able to attend and testify."* Martinez' medical records, supplied to the defense by the Government at the hearing (and subsequently admitted into evidence as Defendants' Exhibit A) not only fail to support these allegations, in fact they flatly contradict them. The report of Dr. Parness, [Police] District Surgeon, dated July 26, 1973, states that he examined Martinez for "blurred vision" on that date and recommended an opthalmological consultation with "Doctor Keil."** The report makes no reference to Martinez' being unable to appear in court, as the Government contended in its affidavit. Moreover, the report of Dr. Keil,*** the opthalmologist to whom Martinez

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*Affidavit of Assistant United States Attorney Pamela Davis, dated July 30, 1973, paragraph 4, annexed as "D" to appellant's separate appendix.

**Dr. Parness' report, dated July 26, 1973, is annexed as "J" to appellant's separate appendix. This was admitted into evidence as part of Defendants' Exhibit A.

***Dr. Keil's report is annexed as "K" to appellant's separate appendix. This was also received into evidence as part of Defendants' Exhibit A.

was referred, states that his examination revealed "no pathology ... other than [an] old corneal scar...." Accordingly, Dr. Keil recommended "no treatment." Thus, the circumstances in the period between August 1 and 7 provided no excuse for the failure to testify.

It is undisputed that Martinez returned to work on August 7 after the first accident and continued to work regularly until September 13 when the second accident occurred. It is also undisputed that Martinez was able to appear and testify during this period. However, because the Assistant United States Attorney in charge of this case had never made any contact with the witness,* the Government was totally unaware of his return to work during this period, and never advised the Court of his availability. Oblivious to these facts, on October 10 the Assistant United States Attorney requested another four-week adjournment based on what the prosecutors' office believed to be a continuing inability to testify** when in fact there were new

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*Martinez' home address and telephone number were on record with his employer, and therefore available to the Government by simply picking up a telephone. Despite this, Martinez was never even informed that the case was scheduled for trial on August 1 or October 12.

While Judge Duffy believed that Assistant United States Attorney Davis had discussed Martinez' symptoms with the police surgeon prior to requesting a continuance on July 30 and October 10 (Opinion at , Appendix "H"), Ms. Davis' representation at the hearing indicates she merely contacted Police Headquarters and never spoke to the Police Surgeon:

> [I] phoned police headquarters and inquired as to the availability of Patrolman Martinez. I was informed that the police surgeon had reported him on sick duty, he was not available for testimony.
>
> (Hearing, 41).

**Affidavit of Assistant United States Attorney Davis dated October 10, 1973, paragraph 3 (Appendix "E").

circumstances which themselves did not justify an adjournment. Indeed, just as in the first period, the witness was able to travel and in fact did so.

It cannot be stated on these facts that the Government exercised "due diligence" to obtain Martinez' appearance in court. This Court stated, in United States v. Rollins, supra, 487 F.2d at 414, that "[t]he threat of dismissal only finds justification in providing an incentive to prosecutors to prepare and bring on cases promptly...." Thus, where circumstances necessitating the delay are "beyond the control" of the Assistant United States Attorney in charge of the case, "this rationale would not be served ... by dismissing a case where the prosecutor's efforts would have been to no avail." Here, unlike Rollins, the Government's lack of diligence directly resulted in extended delays of the trial. The rationale of the Plan therefore mandates reversal.

B. The Government's deliberate failure to advise the District Court of Martinez' undisputed availability after December 2 mandates dismissal of the indictment under the Plan.

The court below found that the witness returned to work on December 3, 1973, and was thereafter available to appear and testify in other cases. It is undisputed that the Government deliberately failed to notify the court that its witness was available as of December 3, 1973, despite the fact that, in its affidavit dated July 30 requesting a four-week adjournment, the Government expressly undertook to keep the court advised of all further developments regarding the availability of Martinez.* At the hearing on March 22, 1974, the Government took the position that it was under no obligation to advise the court of its readiness to proceed because the District Court had set no new trial date following the Government's October 10 request for an additional four-week continuance.

The District Court, apparently accepting the Government's interpretation of the Plan,** held that while it would have been

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*Paragraph 6 states: "I undertake to supply the Court with more specific and updated information as I receive it." Affidavit of Assistant United States Attorney Davis dated July 30, 1973, annexed as "D" to appellant's separate appendix.

**The record reflects that Judge Duffy rejected the Government's other argument that the Plan required the defendants to demand a new trial date and/or production of the witness as a condition precedent to dismissal. (Hearing, 44).

"preferable as a general practice" for the Government promptly to have notified the court and counsel of its readiness on December 3, here it made no difference because the District Judge was actively engaged in "two previously scheduled trials until March 21."*

The District Court was in error in failing to reject the Government's distorted interpretation of the Plan. The Plan was adopted expressly "to bring about the prompt disposition of criminal cases." United States v. Rollins, supra, 487 F.2d at 413. Emphasis added. Here the case was twice adjourned for a one-month period as a result of the Government's unreadiness to proceed to trial. The Government advised both the District Court and defense counsel of this change of status in an affidavit. Rule 4** imposes upon the Government a continuing

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*Opinion at 5, "H" to appellant's separate appendix.

** [Rule] 4. All Cases: Trial Readiness and Effect of Non-Compliance.

> In all cases the government must be ready for trial within six months from the date of the arrest, service of summons, detention, or the filing of a complaint or of a formal charge upon which the defendant is to be tried (other than a sealed indictment), whichever is earliest. If the government is not ready for trial within such time, and if the defendant is charged only with non-capital offenses, the defendant may move in writing, on at least ten days' notice to the government, for dismissal of the indictment. Any such motion shall be decided with the utmost promptness. If it should appear that sufficient grounds existed for tolling any portion of the six-

obligation of readiness following the filing of a Notice of Readiness. United States v. Atkins, 503 F.2d 500, 503 (2d Cir. 1974). Inseparable from this obligation to be ready is the duty which the Plan imposes on the Government to communicate its state of readiness to the court and defense counsel. United States v. Pierro, 478 F.2d 386 (2d Cir. 1973). Only in this way can the court fulfill its "sole responsibility for setting and calling cases for trial." The Plan, Rule 9(c).*

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months period under one or more of the exceptions in Rule 5, the motion shall be denied, whether or not the government has previously requested a continuance. Otherwise the court shall enter an order dismissing the indictment with prejudice unless the court finds that the government's neglect is excusable, in which event the dismissal shall not be effective if the government is ready to proceed to trial within ten days.

** [Rule] 9. Responsibility of United States Attorney and Defense Counsel.

(a) The court has sole responsibility for setting and calling cases for trial. Neither a conflict in schedules of Assistant United States Attorneys nor a conflict in schedules of defense counsel will be ground for a continuance or delayed setting except under unusual circumstances approved by the court and called to the court's attention at the earliest practicable time. Each judge will schedule criminal trials at such times as may be necessary to assure prompt disposition of criminal cases. The United States Attorney will familiarize himself with the scheduling procedures of each judge and will assign or reassign cases in such manner that the government will be able to announce ready for trial.

Further, having expressly undertaken in its affidavit in support of the request for the adjournment to apprise the court of all future developments in the case, it was incumbent on the Government to communicate promptly to the District Court and defense counsel that it was again ready to proceed, regardless of whether the District Judge had set a new trial date. See United States v. Cacciatore, 487 F.2d 240 (2d Cir. 1973).

The District Court reasoned that the Plan necessarily allows the Government a certain amount of flexibility in making its witnesses available for trial. This statement by Judge Duffy is meaningless. Under the Rules, the Government's witnesses are either available or not under excludable periods. The flexibility given the Government under the Plan is to be ready at some time within six months. United States v. McDonough, slip op. 5615, 5616-5617 (2d Cir., October 3, 1974). Once readiness is announced, as it was here, the Government must strictly account for any delay caused by a subsequent change in its ability to proceed to trial. If the Government can delay the trial by failing to report that it is again ready, the purpose of the notice is negated. Here, as a result of the breach of its obligation to re-advise the District Court of its readiness, the trial of this case, which had already been delayed for a period of four months -- from August 1 through December 2 -- due to the witness' alleged "unavailability," was further delayed from December 3 to February 27, when appellant moved to dismiss. The Judge held that this failure to give notice,

while not "preferable as a general practice," could not result in dismissal since his own schedule precluded trial of the case.

However, the District Court completely overlooked other provisions* of the Plan which are intended to apply where the judge to whom the case is assigned is unable to schedule the case for trial in an expeditious fashion. In this event, Rule 2(b) requires that such cases "be reassigned ... in order to carry out the purposes of this Plan. By December 3, 1973, a period of eleven months had elapsed from the date of appellant's arrest. Had the Government notified the District Court of the availability of its witness on December 3, Judge Duffy could have scheduled the case for trial before late March. If not, the Judge was obliged to request reassignment to another judge. While the District Court asserts in his opinion that "the period between December 3, 1973, and March 21, 1974, was taken up by two previously scheduled trials," this is not fully supported by the record, and had he been apprised of the witness' avail-

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* [Rule] 2. Review of Defendants in Custody and Delinquent Cases.

(b) At not more than six-month intervals the judges of the court, or a committee thereof, shall review the status of all persons in custody and all cases in which the maximum time limits set forth in Rules 3 [90 days] and 4 [six months] have been exceeded. Cases shall be reassigned as appropriate in order to carry out the purposes of this plan. The United States Attorney shall be informed of any case in which his office appears to be responsible for unnecessary delay.

ability on December 3, rather than in March, it is likely that this case, which was a brief one,* could have been tried in December or January rather than at the end of March. According to co-counsel's affidavit dated February 22, 1974,** the cases in which the Judge was engaged during this period were Perma Research and Development Co. v. The Singer Co., 66 Civ. 665 ("Perma"), and United States v. Carmine Tramunti, et al., 73 Cr. 1099. Co-counsel Grand represented the plaintiff in Perma, a non-jury civil case. According to Grand's undisputed allegations,***

> [t]he trial of Perma commenced on November 5, 1973, continued through December 14, 1973, when it was adjourned to January 4, 1974, and was adjourned on January 8, 1974, sine die, until the completion of United States v. Carmine Tramunti, et al., 73 Cr. 1099.

These allegations are fully supported by the docket sheets in Perma and Tramunti.*** Thus, if advised in advance, the District Court could have tried the case between December 14 and January 4 or between January 5 and 8. Moreover, as co-counsel further noted, Perma, being a non-jury, civil trial, "could

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*The record reflects that the first trial began at 2:00 p.m. on March 26, 1974, with the selection of a jury and opening statements (Transcript of March 26 at 1, 11). The Government put in its entire case the following day, and the jury was given the case for deliberation at 12:45 p.m. on March 28 (Transcript of March 28 at 243). Thus, the case took less than two days to try.

**Annexed as "F" to appellant's separate appendix.

***Annexed as "L" to appellant's separate appendix.

readily have been adjourned at any time thereafter for the one or two days necessary to try Sanchez." It would seem that the latter course of action would have been particularly appropriate here since Rule 1(c) of the Plan clearly provides that criminal cases "shall be given preference over civil cases...."

Moreover, since the District Court was willing to adjourn Perma sine die until the Tramunti case was completed, it is only reasonable to assume that the Court would have given similar consideration to the present case which was older,* shorter, and easier to try.

CONCLUSION

For the foregoing reasons, the judgment of conviction should be reversed and the indictment ordered dismissed.

Respectfully submitted,

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*The Tramunti docket sheet, annexed as "L" to appellant's separate appendix, reflects that 73 Cr. 1099 superseded 73 Cr. 931. The indictment here is 73 Cr. 48 and was returned in January 1973, prior to the original Tramunti indictment.